

A

PP v. SAMSUL ZARIMAN ZULKAPLI

HIGH COURT MALAYA, IPOH
MOHD RADZI HARUN JC
[CRIMINAL APPEAL NO: AA-42H-5-01-2019]
10 SEPTEMBER 2019

B

CRIMINAL PROCEDURE: *Sentence – Appeal against – Accused pleaded guilty to charge under s. 15(1)(a) of Dangerous Drugs Act 1952 ('DDA') and had two previous convictions – Whether accused punishable under increased penalty provision of s. 39C(1) of DDA – Whether supervision order under s. 38B of DDA ought to be invoked against accused*

C

STATUTORY INTERPRETATION: *Construction of statutes – Intention of Parliament – Legal effect of ss. 38B and 39C of Dangerous Drugs Act 1952 ('DDA') – Whether s. 38B of DDA introduced for person found guilty under s. 15 to undergo supervision after sentence served – Whether s. 39C of DDA not a criminalisation provision but a punishment provision – Whether prosecution could invoke increased penalty provision under s. 39C(1) of DDA*

D

The respondent was charged for an offence under s. 15(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). As he had two previous convictions under the same section, he was punishable under the increased penalty provision of s. 39C(1) of the DDA. The respondent had pleaded guilty to the charge. The Sessions Court Judge ('SCJ') convicted him under the said charge and sentenced the respondent to five years' imprisonment and one stroke of the rotan. The notes of evidence clearly showed that the court was asked to impose the supervision order under s. 38B of the DDA, in view of the fact that the respondent had two previous convictions under s. 15(1)(a) of the DDA. However, the SCJ categorically stated that no order of supervision under s. 38B of the DDA was issued against the respondent. Hence, the Public Prosecutor appealed against the SCJ's failure to make the said supervision order.

E

F

G

Held (allowing appeal):

(1) Section 39C of the DDA is an increased penalty mechanism. Section 39C is not a criminalisation provision. It is a punishment provision. No person can be charged and found guilty under that section. Section 39C of the DDA is an extension of para. 10(2)(b), para. 15(1)(a) and s. 31A of the DDA. A person must be charged and found guilty under para. 10(2)(b), para. 15(1)(a) (as was the case of the respondent) or s. 31A, and one of the criteria set out in s. 39C(1)(a)-(e) of the DDA shall have been fulfilled before s. 39C could be triggered. The SCJ had clearly misdirected herself when she concluded that the respondent was charged

H

I

- under s. 39C(1)(a) of the DDA, which led her to make a fundamental mistake in concluding, *inter alia*, that the respondent could not be subjected to the order for supervision under s. 38B of the DDA as such punishment was not provided for under s. 39C(1). (paras 12-14 & 16) A
- (2) The charge had correctly enumerated the two previous convictions against the respondent under s. 15(1)(a) of the DDA, that enabled the prosecution to invoke the increased penalty provision under s. 39C(1) of the DDA as the criteria enumerated in the second limb of s. 39C(1)(b) *viz.* 'two previous convictions under para. 15(1)(a)' had been fulfilled'. The language used under s. 38B(1) of the DDA is 'Where a person is found guilty of an offence under s. 15 of the DDA, he shall, immediately after having undergone the punishment imposed upon him in respect thereof ...'. The said phrase 'punishment imposed upon him in respect thereof' was drafted with the intent to cover the following two situations: (i) a person is charged for an offence under s. 15 and punished under s. 15 of the DDA; and (ii) a person is charged for an offence under s. 15(1)(a) and punished under s. 39C. Whilst ss. 15, 38B and 39C are all specific provisions, s. 38B is specifically applicable to s. 15, and s. 15(1)(a) of the DDA is specifically applicable to s. 39C of the DDA. (paras 18-20 & 23) B
C
D
- (3) The appeal herein was an instance where this court must interfere as the court below had erred in applying the correct principles in the assessment of sentence. This court allowed the prosecution's appeal and ordered that the respondent be brought before the SCJ for the determination of a period of supervision in accordance with s. 38B of the DDA. (paras 24 & 25) E
F

Case(s) referred to:

Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC (*refd*)

Pakas Rao Applanaidoo & Ors v. Pendaftar Pertubuhan Malaysia & Ors [2015] 8 CLJ 521 CA (*refd*)

PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC (*refd*) G

Legislation referred to:

Dangerous Drugs Act 1952, ss. 10(2)(b), 15(1)(a), 31A, 38B(1), 39A, 39C(1)(a), (b), (c), (d), (e), (2)

For the prosecution - Sunita Kaur Jessy; DPP

For the respondent - Balakrishna Balaravi Pillai; M/s Krish Mano & Assocs H

Reported by Suhainah Wahiduddin

A

JUDGMENT**Mohd Radzi Harun JC:****Introduction**

B

[1] The appeal before this court was brought by the Public Prosecutor against the failure of the learned Sessions Court Judge (“HMS”) to make an order for the respondent to undergo supervision under the provision of s. 38B of the Dangerous Drugs Act 1952 (Act 283) (“DDA”), after having found the respondent guilty for an offence under s. 15 of the same Act.

C

[2] This court had allowed the appeal and ordered the respondent to be brought before the learned HMS for an order of supervision under the said s. 38B of the DDA to be issued against the respondent for a period as she may so determined, as so provided by that s. 38B.

D

[3] The respondent is aggrieved by my finding and filed this appeal. I shall now state my full grounds for coming to such decision.

Background

E

[4] The respondent was charged for an offence under s. 15(1)(a) of the DDA. As he had two previous convictions under the same s. 15(1)(a), he was punishable under the increased penalty provision of s. 39C(1) of DDA. The charge read:

F

Bahawa kamu pada 03/07/2018 jam lebih kurang 2.40 petang, di Pejabat BSJND Kampar, dalam Daerah Kampar, dalam Negeri Perak, telah didapati kamu memberikan kepada diri sendiri dengan memasukkan dadah dalam badan jenis “Morphine”. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 15(1)(a) Akta Dadah Berbahaya 1952 yang mana kamu sebelum ini telah disabitkan dengan (2) kesalahan di bawah s.15(1)(a) ADB 1952 yang sama pada 01/04/2016 dan 28/08/2017 (seperti lampiran). Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah s. 39C(1) Akta yang sama.

G

[5] The respondent, unrepresented at the court below, had pleaded guilty to the charge. The HMS subsequently convicted him under the said charge and sentenced the respondent to five years’ imprisonment from his date of arrest and one stroke of the rotan.

H

[6] The notes of evidence showed clearly that the learned Deputy had asked that the court impose the supervision order under s. 38B of the DDA, in view of the fact that the respondent had two previous convictions under s. 15(1)(a) DDA as evidenced by the Rekod Pusat Pendaftaran Penjenayah (exh. P7). However, the HMS categorically stated that no order of supervision (under s. 38B) was issued against the respondent.

I

[7] The learned HMS stated in her grounds of judgment, the following as her reasons why she does not issue the said supervision order under s. 38B of the DDA:

A

It is very clearly stated in Section 39C(1) that a person shall instead of being liable to the punishment provided under Section 15(1)(a) upon being found guilty and convicted is to be punished with imprisonment for a term which shall not be less than 5 years but shall not exceed 7 years, and he shall also be punished with whipping of not more than 3 strokes.

B

It is my view that S39C(1) DDA clearly states that the person charged under the said section is not governed by the punishment as provided under Section 15(1)(a) of the Act. Therefore it followed that the prevailing Section 38B DDA which is applied for the cases where an Accused is found guilty for cases under Section 15(1)(a) does not apply for cases under Section 39C(1) of the DDA.

C

Therefore upon a literal interpretation of the words in Section 39C(1)(a), this court is of the view that there is no provision nor is there any necessity to mete out the order for police supervision as requested by the prosecution in this case.

D

Finding

[8] At the outset, the learned HMS was correct when she reiterated the provision of s. 39C(1) which provides that a person shall instead of being liable to the punishment provided under s. 15(1)(a) upon being found guilty is to be punished with imprisonment for a term which shall not be less than five years but shall not exceed seven years, and he shall also be punished with whipping of not more than three strokes.

E

[9] I shall pause here and I will revisit the finding of the HMS and point out where she had erred after a brief evaluation on the legislative histories that led to the introduction of ss. 38B and 39C of the DDA.

F

Dangerous Drugs (Amendment) Act 1998: Introduction Of s. 38B

[10] Section 38B was introduced as a new section *vide* the Dangerous Drugs (Amendment) Act 1998 (Act A1025) which came into effect on 15 September 1998 *vide* Gazette No. PU(B) 351/1998. The Parliament Hansard showed that when tabling the Dangerous Drugs (Amendment) Bill 1998 at the Dewan Rakyat on 6 May 1998, the then Minister of Health, YB Datuk Chua Jui Meng, informed the Parliament as follows on the insertion of a new s. 38B:

G

H

Tuan Yang di-Pertua, Fasal 7 bertujuan meminda seksyen 38B **untuk menghendaki seseorang pesalah yang didapati bersalah di bawah Seksyen 15** – pemberian kepada diri sendiri dadah berbahaya atau self administration, dengan izin, akan menjalani pengawasan oleh pegawai pemulihan atau pegawai polis selepas menjalani hukuman yang dikenakan keatasnya. (emphasis added)

I

(Penyata Rasmi Parlimen (Dewan Rakyat) Parlimen Ke-9, Penggal Ke-4, Mesyuarat Pertama, DR 6/5/1998, Ruangan 17)

A *Dangerous Drugs (Amendment) Act 2002: Introduction Of s. 39C*

[11] Section 39C was introduced as a new section *vide* the Dangerous Drugs (Amendment) Act 2002 (Act A1167) which came into effect on 1 November 2002 *vide* Gazette No. PU(B) 342/2002. The Parliament Hansard showed that when tabling the Dangerous Drugs (Amendment) Bill 2002 at the Dewan Rakyat on 19 June 2002, the then Parliamentary Secretary to the Ministry of Health, YB S.G. Sothinathan, informed the Parliament as follows on the insertion of a new s. 39C:

C Memandangkan masalah penagih dadah tegar semakin meningkat, Fasal 8 (Note: “Fasal 8” of the Bill is the new s. 39C) adalah untuk memasukkan seksyen baru dalam Akta Dadah Berbahaya untuk mengenakan hukuman penjara yang lebih panjang serta sebatan ke atas penagih tegar.

D Ada negara seperti Singapura di mana penagih yang ditangkap menagih bagi kali ketiga akan dipenjarakan dari lima hingga tujuh tahun beserta rotan tiga hingga lapan kali. Bagi kesalahan yang berikutnya mereka akan dipenjarakan dari tujuh hingga tiga belas tahun beserta rotan enam hingga dua belas sebatan. Tindakan yang diambil ini didapati memberi kesan yang baik dalam menangani masalah dadah di negara berkenaan.

E Di bawah Akta Dadah Berbahaya 1952 sekarang, penagih dadah terutama yang tegar boleh dipenjarakan sehingga dua tahun setiap kali kerana melakukan kesalahan di bawah seksyen 10 dan seksyen 15, oleh itu tindakan untuk meletakkan penagih-penagih yang tegar di penjara atau kurungan bukanlah perkara baru.

F Dalam pindaan yang dicadangkan, mereka yang pernah menjalani rawatan di pusat pemulihan untuk dua kali atau lebih, atau pernah disabit kesalahan mengguna dadah berbahaya di bawah seksyen 10 atau seksyen 15 sebanyak dua kali atau lebih, atau gagal memberi air kencing untuk ujian yang diperuntukkan di bawah seksyen 31A, sebanyak dua kali atau lebih dan di samping itu pernah menjalani rawatan pemulihan atau disabitkan kesalahan menggunakan dadah berbahaya akan dikenakan hukuman penjara lima hingga tujuh tahun dan sebatan tidak melebihi tiga kali, sekiranya disabit lagi kesalahan di bawah seksyen 10, seksyen 15 atau seksyen 31A. Mereka yang mengulangi lagi kesalahan-kesalahan tersebut, akan dikenakan hukuman penjara tujuh hingga tiga belas tahun dan sebatan tiga hingga enam kali.

H (Penyata Rasmi Parlimen (Dewan Rakyat) Parlimen Ke-10, Penggal Ke-4, Mesyuarat Kedua, DR 19/6/2002, Ruangan 16)

[12] The excerpt of the speeches above established unambiguously the following facts:

I (i) The intention of Parliament when s. 38B was introduced into the DDA was plainly for any person found guilty under s. 15 to undergo supervision after the said person completed serving his sentence. The phraseology used by the Minister was “selepas menjalani hukuman yang

dikenakan ke atasnya”, which was the correct expression of the phrase “after having undergone the punishment imposed upon him in respect thereof” found in s. 38B. That section never used the phrase “after having undergone the punishment imposed upon him under that section, ...”. As this formed the main crux of the basis of this court’s finding in this appeal, I shall discuss this important issue specifically in the subsequent paragraphs.

- (ii) Section 39C is an increased penalty mechanism;
- (iii) Section 39C, would apply in situations when:
 - (a) an accused is charged and found guilty under three provisions only namely s. 10(2)(b), s. 15(1)(a) – as in the case of the respondent – or s. 31A; and
 - (b) the situations enumerated in paras. (a)-(e) to sub-s. 39C(1) had been fulfilled;
- (iv) In the event that a person who has been punished under the said s. 39C(1), is convicted of a subsequent offence under s. 10(2)(b), s. 15(1)(a), or s. 31A, that person shall be liable to the increased penalty mechanism as provided under s. 39C(2);
- (v) Section 39C is similar in its legal effect with s. 39A of the same Act. The main difference between s. 39C and the other increased penalty mechanism under s. 39A introduced by Parliament in 1987 is that whilst s. 39C is confined only to offences under para. 10(2)(b), para. 15(1)(a) and s. 31A, s. 39A on the other hand applies to an offence under any provisions of the Act.

Erroneous Findings Of The HMS

[13] Having set out the legal effect of ss. 38B and 39C as intended by Parliament, it is my finding that the learned HMS had clearly misdirected her mind when she concluded that the respondent was charged under s. 39C(1)(a) of the DDA. Her misconception was clearly manifested in her grounds of judgment:

... Hence this entitled the prosecution to choose to charge the Accused under the stricter penalty provided for in S39C(1) DDA instead of relying only on S15(1)(a) DDA ... In this case presently before me, the charge preferred against the Accused is S39C(1)(a) of the DDA. ...

[14] It is my finding that as the learned HMS had made that fundamental mistake in concluding that the respondent was charged and found guilty under s. 39C, the said fundamental mistake had the causal effect which led her to make the following flawed findings:

- (i) that s. 38B would only apply if the respondent was found guilty under s. 15(1)(a);

- A (ii) that s. 38B does not apply in the instant case of the respondent whom although was charged under s. 15(1)(a), but was found guilty under s. 39C(1);
- (iii) that as the respondent was found guilty and convicted under s. 39C(1),
- B s. 39C(1);
- (iv) consequentially, the respondent cannot be subjected to the order for supervision under s. 38B as such punishment is not provided for under s. 39C(1).

C [15] The above conclusions were drawn from another clear misdirection of mind as clearly manifested in another paragraph of the grounds of judgment of the learned HMS:

It is my view that s. 39C(1) DDA clearly states that the person charge under the said section is not governed by the punishment as provided under Section 15(1)(a) of the Act. Therefore it followed that the prevailing section 38B DDA, which is applied for the cases where an Accused is found guilty for cases under Section 15(1)(a) does not apply for cases under section 39C(1) of the DDA.

E Therefore upon a literal interpretation of the words in Section 39C(1)(a), this court is of the view that there is no provision nor is there any necessity to mete out the order for police supervision as requested by the prosecution in this case.

F [16] Section 39C (just as in the case of s. 39A) is not a criminalisation provision. It is a punishment provision. No person can be charged and found guilty under that section. Section 39C is an extension of s. 10(2)(b), s. 15(1)(a) and s. 31A. A person must be charged and found guilty under s. 10(2)(b), s. 15(1)(a) or s. 31A, and one of the criteria sets out in s. 39C(1)(a)-(e) shall have been fulfilled before s. 39C can be triggered. This is unequivocally clear when the provision states:

G Where a person who has not less than ... is found guilty of an offence under paragraph 10(2)(b), paragraph 15(1)(a) or section 31A, he shall, instead of being liable to the punishment provided ... be punished with ...

H [17] Thus, the prosecution was correct when they drafted the charge against the respondent that read:

... Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s. 15(1)(a) ADB 1952 ... yang boleh dihukum di bawah s. 39C(1) Akta yang sama.

I

[18] The charge also correctly enumerated the two previous convictions against the respondent under s. 15(1)(a) DDA, as evidenced by exh. P7, that enabled the prosecution to invoke the increased penalty provision under s. 39C(1) as the criteria enumerated in the second limb of s. 39C(1)(b), viz. “two previous convictions under s. 15(1)(a)”, had been fulfilled.

A

[19] The language used under s. 38B(1) DDA is “Where a person is found guilty of an offence under s. 15, he shall, immediately after having undergone the punishment imposed upon him in respect thereof, ...”.

B

[20] It is my finding that the said phrase “punishment imposed upon him in respect thereof” was drafted with the intent to cover the following two situations:

C

- (i) A person is charged for an offence under s. 15 and punished under s. 15; or
- (ii) A person is charged for an offence under s. 15(1)(a) and punished under s. 39C.

D

[21] Had Parliament intended that s. 38B only covers a situation when a person is charged under s. 15 and also punished under the same s. 15, as decided by the learned HMS, it is my finding that Parliament would have worded s. 38B differently, such as:

E

Where a person is found guilty of an offence under section 15, he shall, immediately after having undergone the **punishment imposed upon him under that section**, ...
(emphasis added)

[22] The Federal Court in *PP v. Tan Tatt Eek & Others* [2005] 1 CLJ 713 had affirmed the long-standing principle that it is the primary duty of the court to give effect to the intention of Legislature in the words used by it. When the words of a statute are clear, plain and unambiguous, the courts are bound to give effect to that meaning.

F

[23] Aside from that, it is my finding that whilst ss. 15, 38B and 39C are all specific provisions, s. 38B is specifically applicable to s. 15, and s. 15(1)(a) is specifically applicable to s. 39C. I would apply the principle of statutory interpretation that derived from the maxim *generalalia specialibus non derogant*, as explained in *Pakas Rao Applanaidoo & Ors v. Pendaftar Pertubuhan Malaysia & Ors* [2015] 8 CLJ 521; [2015] 5 MLJ 500 where the Court of Appeal said:

G

H

The maxim *generalibus specialia derogant* is a legal principle which implies that the special provision is one that derogates from the general provision and the special provision must be interpreted strictly in the case; and that a general provision cannot remove a special provision. It is a basic principle of statutory interpretation. It was referred to in *Public Prosecutor v. Chew Siew Luan* [1982] CLJ Rep 285; [1982] 2 MLJ 119 (FC), wherein Raja Azlan Shah CJ (Malaya) (as HRH then was) said:

I

- A ... *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. (See also *Public Prosecutor v. Chua Boew Hin*).

Conclusion

- B [24] In *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457; [2002] 3 MLJ 193, the Federal Court had clearly stated that the appellate court will not normally alter the sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or the court erred in applying the correct principles in the assessment of sentence. This appeal
- C before me is an instance where this court must interfere as the court below had erred in applying the correct principles in the assessment of sentence, based on my findings as stated in the preceding paragraphs.

- D [25] Based on the reasons and consideration as enumerated above, I allowed the prosecution's appeal and ordered that the respondent to be brought before the learned HMS for the determination of a period of supervision in accordance with s. 38B of the DDA.

E

F

G

H

I